IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 1524 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE K.M.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ? **-No.**

2 To be referred to the Reporter or not ? **-No.**

3 Whether their Lordships wish to see the fair copy of the judgment ? **-No.**

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? **-No.**

5 Whether it is to be circulated to the civil judge ?**-No.**

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RASIKLAL MAGANLAL UPADHYAY - Petitioner(s)
Versus
JASODABEN MANGALDAS RAJGOR - Respondent(s)

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Appearance :
MR PRANAV G DESAI for Petitioner(s) : 1,
MR DEVANG VYAS for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE K.M.MEHTA

Date : 23/02/2007

ORAL JUDGMENT

1. Rule. The learned advocate for the respondent

waives service of Rule.

2. Shri Rasikbhai Maganlal Upadhyay, petitioner has filed this petition under Article 227 of the Constitution of India with a prayer that this Court may be pleased to issue writ of certiorari or any other appropriate writ, order or direction, quashing and setting aside the order passed by the Civil Judge (SD), Vadnagar dated 3/1/2006 on Application of the Petitioner, Annexure-F hereto and be pleased to direct the learned Trial Court to frame all the issues suggested by the petitioner vide Application Exh.168, Annexure-C in Regular Civil Suit No.172 of 1991 in the present petition.

3. The facts of this case are narrated as under:

3.1) The petitioner has filed Regular Civil Suit No.172 of 1991 before the learned Civil Judge (SD), Vadnagar against the respondent-Smt.Jasodaben Mangaldas Rajgor for declaration and permanent injunction.

3.2) In the suit, the petitioner has stated that the petitioner is a owner of the property situated at village Sipor paiki gamthan patrak bearing Sr. No.843 admeasuring east-west 16.6 ft. and north-south 62.5 ft. The said is a measurement of a land. Originally on the said, there was a building. Originally the said building was owned by Kirpashankar Lilaram Joshi and present plaintiff has purchased the said building from elder brother of the plaintiff-Natthuram Veniram on 14/3/1929. Therefore, plaintiff is owner of the said property since long. On the said building, on east-west there is a two and half feet land of naveri (small way). On the west of naveri, the property of the defendant is situated. The plaintiff is using the said naveri since long and they are entitled to repair the same. On the said naveri, the defendant has no right in this behalf. The plaintiff has recently came to know that the defendant desires to make some repairing regarding sanding of his property and also desires to extend the length of his building in such a way

that the naveri of the plaintiff may be completely close. In view of the same, the plaintiff has filed present suit for declaration that the plaintiff has a naveri on east side of his building and defendant has no right for sanding so as to restrain the use of naveri fosr the plaintiff. The suit was filed on 22/11/1991.

3.3) During the pendency of the aforesaid petition, the petitioner preferred an application under Order 6 Rule 17 of the Code of Civil Procedure for amendment of plaint vide Exh.78. The respondent also replied on 27/4/1998.

4. After hearing both the parties, the learned Trial Judge was pleased to pass an order on 8/3/1999 and allowed Exh.78 application.

5. Thereafter the learned Judge has framed some issues at Exh.59 on 30/4/2003. There are about 11 issues which are at page 32 of the paper book.

6. Thereafter the plaintiff filed an application on

22/11/2004 raising about five more issues in this behalf. The said issues are at page 29 of the paper book.

7. It is the case of the plaintiff that the aforesaid issues have been required to be framed on the ground that the plaint has been subsequently amended and amended plaint requires additional issues.

8. Thereafter the learned Judge heard the matter and by order dated 4/7/2005, order below Exh.166 and 168, has held that issue no.1 is required to be added but other issues are already covered by earlier issues and therefore they are not required to be added in this behalf. The respondent has replied to the amendment on 26/7/2005. Thereafter, plaintiff has filed application Exh.178 on 27/9/2005 stating that other issues are required in view of the amendment of the plaint. The defendant has filed reply to the said application on 26/10/2005.

9. Thereafter the learned Judge by his judgment and order dated 3/1/2006 held that this Court has already passed an order and now there is no necessity to review the order regarding addition of issues.

10. Being aggrieved and dissatisfied with the said judgment and order, the petitioner has filed this petition before this Court on 1/2/2006.

11. I have heard Mr.Pranav Desai, learned advocate for the petitioner in this behalf. He submitted that the learned Trial Judge ought to have seen that in view of the amendment being granted and the plaint duly amended, all the issues framed by the petitioner vide Exh.168 were required to be allowed. He has further submitted that the learned Trial Court has erred in not properly appreciating the contentions that the prayer is for raising all the issues and there cannot be any question of any review of the order. It was contended by the petitioner that in view of the facts and circumstances of the case and in view of

the fact that the plaint has been amended it is necessary to add all the issues suggested by the petitioner et Exh.168.

12.On the other hand the respondent has tried to support the order of the learned Trial Judge in this behalf.

13.I have gone through the records of the case. I have also gone through the original plaint and amendment of plaint. I have gone through the original issues and as well as additional issues raised by the parties. The additional issue nos.2 to 5 will have to be put to adjudicate the real controversy in the suit. In view of the same, the order of the learned Trial Judge rejecting the additional issues is required to be quashed and set aside. In my view, the learned Judge has not properly appreciated that the additional issues are required as the burden is also on the plaintiff to prove the same and those issues have relevance in the controversy which is raised in the suit in this behalf and therefore, the same

are material issues in this behalf.

14. In view of the same, the order of the leaned Trial Judge dated 3/1/2006 is quashed and set aside.

15. The learned Trial Judge is requested to hear and dispose of the the matter after addition of all the issues without being influenced by the order passed by this Court. Special Civil Application is allowed partly. Rule made absolute to the aforesaid extent. Matter is disposed of accordingly.

(K.M.MEHTA, J.)

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